Nov/Dec 2009

FOIP FOLIO

SEASON'S GREETINGS!

All of us at the Office of the Information and Privacy Commissioner (OIPC) extend our best wishes to our FOIP FOLIO subscribers. We wish you happy holidays and all the best in 2010.

OIPC INVESTIGATION REPORT F-2009-001 (SASKATCHEWAN WORKERS' COMPENSATION BOARD)

The Complainant was an injured worker who sought compensation from the Saskatchewan Workers' Compensation Board (WCB) under *The Workers' Compensation Act, 1979*. The Complainant identified four concerns with actions of WCB in regard to his personal information and the way it was collected, used and disclosed. The Commissioner, under the authority of *The Freedom of Information and Protection of Privacy Act* (FOIP), found that one of the complaints dealing with the disclosure of personal information of the Complainant to a third party without the Complainant's consent and without legal authority to do so was well-founded. The Commissioner offered a number of recommendations to WCB with respect to that complaint. The other three complaints were not well-founded. The Commissioner expanded the investigation, however, to address whether WCB had met its duty under FOIP to ensure the personal information it collected was accurate and complete. He found that WCB had not met this duty. The Commissioner offered a number of recommendations regarding this failure to discharge its obligations related to accuracy of the personal information it collected about the Complainant and whether that personal information was complete.

This Report is available at our website, www.oipc.sk.ca under the 'Reports' tab.

TABLE OF CONTENTS

OIPC Investigation Report F-2009-001 (SK WCB).....1
OIPC Review Report LA-2009-001 (SK Health Research Foundation).....2
Report on Management of Access Requests from Patients to Saskatchewan Regional Health Authorities.....2
Solicitor-Client Privilege and Control Over the Record.....2
B.C. Supreme Court Upholds Commissioner's Order.....3
Proactive Disclosure.....3
Genetic Information Non-Discrimination Act (GINA).....3
FINTRAC and the Privacy Commissioner of Canada.....4
Saskatchewan Businesses Should be Made Aware.....5
Ontario Publication on Smart Privacy for the Smart Card...5
Children's Online Privacy Discussion Paper Launched.....5
Roundtables on Consumer Privacy Issues.....6
Chartered Accountants GAPP.....6
Standards on Privacy and Personal Data.....6
Can your Insurer view your Facebook Photos?.....6
Juror Lists in Saskatchewan.....7
Alberta Commissioner Disappointed 7
Mark your Calendar.....7

OIPC REVIEW REPORT LA-2009-001 (SASKATCHEWAN HEALTH RESEARCH FOUNDATION)

The Applicant made four different requests to the Saskatchewan Health Research Foundation (SHRF) for grant applications made by researchers. SHRF denied access relying on sections 18(1)(b), 18(1)(c) and 28(1) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). The Commissioner found that SHRF had authority to withhold the material pursuant to these sections, but recommended release of information withheld that was otherwise publicly available pursuant to sections 3 and 4 of LA FOIP. Though raised by the parties to the review, the Commissioner did not find that sections 17 or 13(2) of LA FOIP had any application in the circumstances.

This Report is available at our website, www.oipc.sk.ca under the 'Reports' tab.

REPORT ON MANAGEMENT OF ACCESS REQUESTS FROM PATIENTS TO SASKATCHEWAN REGIONAL HEALTH AUTHORITIES

On December 14, 2009 the OIPC tabled with the Legislative Assembly, a Report that examines the way that the 12 regional health authorities are dealing with access requests from patients. The Report examines the applicable law, best practices and a variety of tools and commentary from the OIPC on this topic. It emphasizes the importance of the right of access and stresses the need to ensure that all regions adopt appropriate, clear, simple forms and procedures to deal promptly and efficiently with those access requests. In the Report, we discuss the strengths and weaknesses in the various forms currently utilized by our health regions and offer 11 specific recommendations for improvement. Although our focus was exclusively regional health authorities in Saskatchewan, the comments about how to manage access requests will be applicable to all trustees under *The Health Information Protection Act.* This Report can be viewed on our website, www.oipc.sk.ca

SOLICITOR-CLIENT PRIVILEGE AND CONTROL OVER THE RECORD

Our office has been asked whether the documents from a public body that have been provided to its lawyer would or would not continue to be in the control of the public body. Although we have not addressed that in a published review report, we can refer you to the decision of Robert Clark, the former Alberta Information and Privacy Commissioner, who addressed this issue in Alberta Order 2000-022 at para. 42. Commissioner Clark stated that "...if a client has not waived solicitor-client privilege, the client has a continuing right of legal control over the record, despite the fact that the solicitor may physically have custody of the records that are covered by the privilege." The result is that if a public body transfers records to its solicitor's office, those records would still be considered under the control of the public body. Mind you, those records may be subject to solicitor-client privilege and, where appropriate, be subject to the discretionary exemption in section 22 of Saskatchewan's FOIP Act. The Alberta Order is available at www.oipc.ab.ca.

B.C. SUPREME COURT UPHOLDS COMMISIONER'S ORDER

There are a number of significant findings by the British Columbia Supreme Court in a judicial review proceeding from Order F08-07 issued by David Loukidelis, Information and Privacy Commissioner. Justice Grauer dismissed the application and upheld the order of Commissioner Loukidelis. Although the case turned on third party notice and proceedings and their impact on the overall request for access, there are other observations worth considering in Saskatchewan. At issue was whether the time to respond to an access request should be suspended until the Commissioner made his decision on the third party's request for a review. The Court opted to follow the Commissioner's interpretation that would allow for prompt access to uncontroversial information rather than the interpretation of the public body that would delay all access to the very end of the process. The Court discussed the importance of the 'modern principle of statutory interpretation' and stressed that it was necessary to take into account the context of the access review, the scheme and the object of FOIP. Justice Grauer also reviewed a number of cases on judicial review and observed that the reviewing court *"should show deference in a case such as this to the Commissioner's interpretation of his home statute, based on his expertise and his polycentric functions"*. The court decision is available at 2009 BCSC 1700.

PROACTIVE DISCLOSURE

On December 11, 2009 our office added a new feature to our website – 'Proactive Disclosure'. Although our office is not a "government institution" for purposes of FOIP, we have decided to adopt the practice of the federal Information Commissioner and Privacy Commissioner and public bodies in a number of other jurisdictions by posting to our website details of our travel expenses for education presentations, investigations and conferences. This will be updated on an annual basis.

GENETIC INFORMATION NON-DISCRIMINATION ACT (GINA)

On November 21, 2009 the *Genetic Information Non-Discrimination Act* (GINA) took effect. This amends United States anti-discrimination laws to prohibit employers of fifteen persons or more from using genetic information in employment decisions. It also imposes certain restrictions on employers and others who wish to acquire genetic information. This law is enforced by the U.S.A. Equal Opportunity Employment Commission.

There is no equivalent regulation of genetic information in Saskatchewan.

FINTRAC AND THE PRIVACY COMMISSIONER OF CANADA

On November 17, 2009 the federal Privacy Commissioner, **Jennifer Stoddart,** released an in-depth audit report of the database maintained by the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC). She concluded that the agency has more personal information in its database than it needs, uses or has the legislative authority to receive. You can access the full audit report at www.priv.gc.ca

From a Saskatchewan perspective, we have seen a number of financial and business organizations requiring citizens to produce health services cards and then copying and retaining a copy of the health services card. If the citizen later complains that they were **required** to produce their health services card in order to receive some non-related service, unless the financial institution, realtor, broker, lawyer, etc. can establish that this was not a requirement but only an option, this could be treated as an offence under *The Health Information Protection Act*, section 11. That provides as follows:

11(1) An individual has the right to refuse to produce his or her health services number or any other prescribed identifying number to any person, other than a trustee who is providing a health service, as a condition of receiving a service.

(2) Except as provided in subsection (3), no person shall require an individual to produce a health services number as a condition of receiving any product or service.

(3) A person may require the production of another person's health services number:

(a) for purposes related to:

(i) the provision of publicly funded health services to the other person;

(ii) the provision of a health service or program by a trustee; or

(b) where authorized to do so by an Act or regulation.

The penalty could be a fine of up to $50,000 for an individual or $500,000 for an organization.

In addition, most agencies subject to FINTRAC are not required to make and retain copies of the actual identity card. This could also lead to difficulty for those agencies under the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA).

All Saskatchewan businesses subject to FINTRAC should become familiar with section 11 of HIPA as well as the FINTRAC advisory and tools on the federal Privacy Commissioners website.

SASKATCHEWAN BUSINESSES SHOULD BE AWARE OF PENDING CHANGES TO ALBERTA'S PERSONAL INFORMATION PROTECTION ACT (PIPA)

On November 18, 2009 Alberta's Bill 54 the *Personal Information Protection Amendment Act* received third reading and will likely be proclaimed in force in 2010. Any Saskatchewan organization that carries on business in Alberta should learn about the significant changes to how privacy must be better protected in our western neighbour jurisdiction. One of the changes is the requirement to notify the Commissioner of any incident involving the loss of, or unauthorized access to or disclosure of, personal information where a reasonable person would consider there exists a real risk of significant harm. Another change is the requirement to notify individuals how they can obtain information about out-of-Canada service providers if a business is utilizing a service provider outside of Canada who will have the use of citizen's personal information. For more information visit, www.oipc.ab.ca.

ONTARIO PUBLICATION ON SMART PRIVACY FOR THE SMART GRID

Ontario Information and Privacy Commissioner, Ann Cavoukian, has released a new white paper with two co-authors, Jules Polonetsky and Christopher Wolf, entitled *SmartPrivacy for the Smart Grid: Embedding Privacy in the Design of Electricity Conservation*. This publication deals with personal information about consumers in the use of electricity in their own homes. Technology now allows for the collection of many kinds of intimate information about consumers through appliances and other devices to the company providing electrical power. For more information contact www.ipc.on.ca.

NATIONAL LAUNCH OF CHILDREN'S ONLINE PRIVACY DISCUSSION PAPER

At the International Conference on Child Rights in Ottawa on November 19, 2009 there was the launch of the discussion paper, "*There Ought to be a Law: Protecting Children's Online Privacy in the 21st Century*". This was part of events to commemorate the 29th anniversary of the Convention on the Rights of the Child. The paper explores some of the possible amendments that can be made to existing legislative instruments to better protect the online privacy of children. You can access the discussion paper at http://www.gnb.ca/ombudsman.

ROUNDTABLES ON CONSUMER PRIVACY ISSUES

In 2010, the Privacy Commissioner of Canada will host a series of roundtables on what are and will likely be the key privacy issues affecting consumers now and in the near future and whether the federal PIPEDA meets the challenges posed by those issues. The topics for the roundtables will be related to two of that office's strategic priorities, namely, information technology and identity management.

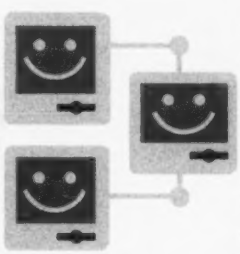
CHARTERED ACCOUNTANTS GAPP

A new tool has been developed by the Canadian Institute of Chartered Accountants and the American Institute of Certified Public Accountants which asserts that "privacy is a business issue." This document is entitled as *Generally Accepted Privacy Principles* (GAPP) and is intended to be used "as an operational framework to help management address privacy in a manner that takes into consideration many local, national, or international requirements. The primary objective is to facilitate privacy compliance and effective privacy management. The secondary objective is to provide suitable criteria against which a privacy attestation engagement (usually referred to as a privacy audit) can be performed."

STANDARDS ON PRIVACY AND PERSONAL DATA

There are a number of recent developments which are strengthening the universal character of the rights to data protection and privacy. This includes encouragement from International Data Protection and Privacy Commissioners for the development of a universal convention for the protection of individuals with respect to the processing of personal data. A number of organizations such as the Council of Europe, the International Law Commission of the United Nations and the OECD have urged the adoption of a universal Convention. This movement in support of international standards appears to be gaining momentum.

CAN YOUR INSURER VIEW YOUR FACEBOOK PHOTOS TO ASSESS YOUR INJURIES?



In the Ontario Superior Court of Justice, an insurer attempted to view the online information about a plaintiff who was suing for damages from a vehicle accident and had a Facebook account. The court considered two other cases involving the issue of access to a person's Facebook account: Wice v. The Dominion of Canada General Insurance Company, [2009] O.J. No. 2946, 2009 CanLII 36310 (S.C.J.) and Leduc v. Roman, [2009] O.J. No. 681, 2009 CanLII 6838 (SCJ.) Ultimately Justice Price refused the application for a preservation order after finding that there was only speculation but no evidence to support the conclusion that evidence might be destroyed without a preservation order. Nonetheless, there is an interesting discussion in this case about Facebook information and under what circumstances the court may require that the other side in a lawsuit might be able to view a plaintiff's Facebook material. You can view Justice Price's decision in Schuster v. Royal & Sun Alliance Insurance Company of Canada at 2009 CanLII 58971 (ON S.C.).

JUROR LISTS IN SASKATCHEWAN

You may have heard of recent concerns in Ontario and British Columbia about misuse of information collected about potential jurors and not provided to defence counsel. Our office made inquiries as to the situation in Saskatchewan. What we have learned is that Saskatchewan Justice has a specific policy dealing with jury lists and background checks. Under this policy, the police conduct criminal record checks on prospective jurors and the results of those checks are provided to the Crown Prosecutor. The prosecutor, in turn, must disclose those results to defence counsel in accordance with the policy. The policy also states that if the police provide additional information to the Crown prosecutor about a prospective juror and such information suggests the person may not be impartial, this information should also be disclosed to defence counsel. The Saskatchewan Justice policy also prohibits Crown prosecutors from asking the police to investigate the background of any potential juror, regardless of the circumstances.

ALBERTA COMMISSIONER DISAPPOINTED NON-PROFITS LEFT OUT OF PIPA

On October 28, 2009, Alberta Information and Privacy Commissioner, Frank Work, issued a news release reacting to changes to that province's *Personal Information Protection Act*. Among other things, Commissioner Work stated: *"I am extremely disappointed that a recommendation to bring all not-for-profit organizations under the scope of PIPA is no longer going forward. All this does is creates confusion about which non-profits are in and which are out."* He added, *"a large segment of society served by not-for-profit organizations is currently without privacy protection. Amending the Act to fully include not-for-profit organizations would protect the personal information of the clients, employees, volunteers and donors of those organizations and would provide effective oversight to ensure individual privacy rights are upheld. It is worth noting that many of these organizations collect highly sensitive personal information that should be subject to legislative protection."* You can view the release at www.oipc.ab.ca.

MARK YOUR CALENDAR!

Canadian Bar Association Privacy and Access Law Section meetings in Regina and Saskatoon. To register for any of the following section meetings call CBA at (306) 244-3898

Regina Meetings

- **February 8, 2010:** *Privacy and Access Law South (CBA section meeting).* Hotel Saskatchewan, Regina at 12:00 noon. Topic: Solicitor-Client Privilege and Access to Information Requests. Speaker: TBA. To register call Lorraine at (306) 244.3898

MARK YOUR CALENDAR (continued...)

Canadian Bar Association Privacy and Access Law Section meetings in Regina and Saskatoon. To register for any of the following section meetings call CBA at (306) 244-3898

Saskatoon Meetings

- **February 8, 2010:** *Privacy and Access Law North*, Saskatoon Club, Saskatoon at 12:00 noon. Topic: Workplace Privacy Issues. Speakers: Kaylea Dunn and David Stack, McKercher LLP.

January 28—29, 2010: *Health Information, Privacy, Safety & Security*, St. Andrew's Club & Conference Centre, 150 King Street West, Toronto, Ontario. For more information, visit Health Information, Privacy, Safety & Security

February 9—10, 2010: *11th Annual Privacy and Security Conference*, Victoria, British Columbia. For more information, visit www.rebootconference.com/privacy2010/

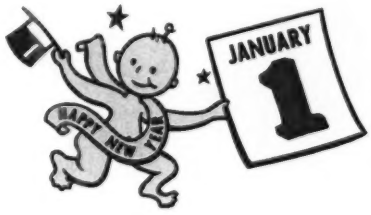
April 19—21, 2010: *IAPP Global Privacy Summit*, Washington, D.C. For more information, visit www.privacysummit.org/

June 9—11, 2010: *2010 Access and Privacy Conference*, Marriott Hotel, River Cree Resort, Edmonton, Alberta. For more information, visit www3.extension.ualberta.ca/accessandprivacy/

Season's Greetings

and

Happy New Year!



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